RECORD
AND
BRIEFS

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No. 22O141, Original

In The
Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion to Intervene

TEXAS' BRIEF IN RESPONSE TO EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

El Paso County Water Improvement District No. 1 (EPCWID) seeks to intervene in this Original Action. The standard for intervention in an Original Action among states is high because it is intended to respect state sovereignty and protect the Supreme Court's limited resources. EPCWID's motion fails to meet this high standard and should be denied.

STATEMENT

The State of Texas was granted leave to file its Complaint against the State of New Mexico in order to obtain a determination and enforcement of its rights to the waters of the Rio Grande pursuant to the Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (hereinafter Rio Grande Compact or Compact). (The Rio Grande Compact is reprinted in the Appendix to the Complaint filed by Texas.) *See* Texas' Brief in Support of Motion for Leave to File Bill of Complaint at 1. The United States was allowed to intervene in this action, as a plaintiff, because of the distinct federal interests involved in this case that are best presented by the United States. *See* Motion of the United States for Leave to Intervene as Plaintiff at 1-2.

New Mexico has moved to dismiss both the Texas and United States complaints. These motions to dismiss have been opposed by both Texas and the United States; they are still pending.

EPCWID is not a party to the Rio Grande Compact. In its Motion for Leave to Intervene (hereinafter EPCWID Motion), EPCWID attempts to justify its intervention based upon the erroneous claim that it "is the sole direct Texas beneficiary of the [Rio Grande] Project" and "thus has a unique and compelling interest in this Court's resolution of the interstate dispute regarding the waters of the Rio Grande." EPCWID Motion at 2.[1] EPCWID also claims "unique bi-state interests" that will aid the Court's decision in this matter. Memorandum In Support of Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene As A Plaintiff (EPCWID Mem.) at 28. These purposes, even if they were true, are not sufficient to meet the high standard for intervention imposed by this Court.

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[1] Contrary to this claim, all those who use water between the Texas state line and Ft. Quitman have an interest in and benefit from Texas' Compact apportionment of Rio Grande water.

ARGUMENT

I. EPCWID'S REQUEST FOR INTERVENTION SHOULD BE DENIED

A. Standard for Intervention

The appropriate standard for intervention in original actions by non-state entities is set forth in *New Jersey v. New York*, 345 U.S. 369 (1953) (*New Jersey*). Under this standard, a non-state entity is only permitted to intervene where: (1) it has "some compelling interest in [its] own right," (2) that interest is different from its "interest in a class with all other citizens and creatures of the state," and (3) that interest is "not properly represented by the state." *Id.* at 373; *see also South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (*South Carolina*). The Court has acknowledged that this is a high standard "and appropriately so" as it is intended to respect state sovereignty and protect the Supreme Court's limited resources. *South Carolina*, 558 U.S. at 267.

As the Court explained in *New Jersey*, "original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens." *New Jersey*, 345 U.S. at 372. The doctrine of *parens patriae* recognizes "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id.* This principle "is a necessary recognition of sovereign dignity, as well as a working rule for good

judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373. Intervention in original actions is therefore only allowed in "compelling" circumstances. *Id.*

The Court has a long history of rejecting attempts by nonsovereign entities to intervene in interstate water disputes. *South Carolina*, 558 U.S. at 281. Until recently, in original actions involving an equitable apportionment, the Supreme Court had only granted intervention to the United States and to Indian tribes. *Id.* at 277, 281-83. As Chief Justice Roberts explained in his dissent in *South Carolina*:

> The reason is straightforward: An interest in water is an interest shared with other citizens, and is properly pressed or defended by the State. And a private entity's interest in its particular share of the State's water once the water is allocated between the States, is an "intramural dispute" to be decided by each State on its own.

Id. at 279 (Roberts, C.J., dissenting in part). This Court's decisions instruct that only the United States, Indian tribes, or other uniquely situated entities, will be allowed to intervene in an original action, such as this one. Because interstate water disputes are cases "between States, each acting as a

quasi-sovereign and representative of the interests and rights of her people," the States are presumed to speak in the best interests of their citizens as a whole, and intervention is not permitted where a entity wholly located and operating within a single state seeks to inject itself into the interstate dispute. *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

B. EPCWID Has Not Met the High Standard for Intervention

1. EPCWID's Interest in the Rio Grande Project Is a Separate and Independent Issue Not Before the Court

EPCWID's argument for intervention is defective because it focuses on various contracts and agreements related to the Rio Grande Project as opposed to the actual Compact claims that Texas and the United States have pled in this original action. EPCWID claims a "direct stake in this controversy based on its interest in the Rio Grande Project and contracts allocating Project water . . . ." EPCWID Mem. at 14. It does not claim, however, a direct stake in the Rio Grande Compact. This original action is a dispute between sovereign states regarding the interpretation of an interstate compact apportioning the waters of the Rio Grande. It is not a dispute over the Rio Grande Project.

This fundamental aspect of the action was articulated when Texas sought leave to file its Complaint in the United States Supreme Court. In

its Reply to New Mexico's Opposition to the Motion for Leave to File the Complaint (Reply), Texas explained that the Rio Grande "Compact cannot be understood without an understanding of the Rio Grande Project." Reply at 4. However, the "interrelationships between the Compact and the Project do not convert Texas' Compact claims into Project claims." *Id.* The United States reiterated this understanding of the dispute when it expressed its view that Texas' motion for leave to file a complaint should be granted. Brief for the United States as Amicus Curiae (Dec. 10, 2013) at 11 (" . . . Texas has adequately pled an injury to its sovereign rights under a reasonable interpretation of the Compact."). The Supreme Court agreed with this characterization of the action when it granted the motion for leave to file the Complaint.

The nature of the dispute has not changed since the Supreme Court granted Texas' motion to file a Complaint against New Mexico. This is an interstate compact case. As such, a potential intervenor must identify a compelling and unique interest under the Rio Grande Compact. Although the history of the Project may be relevant to the interpretation of the Compact, the Court will not be examining or determining the "rights and obligations in and to the Rio Grande Project and the contracts relating to the Project." *See* EPCWID Mem. at 20. To resolve this dispute, the Court will interpret the Compact and declare the rights and obligations of the signatory states thereto.

The interjection by EPCWID of extraneous claims and issues based upon its interest in the operation of the Project, delivery of Project water, and the terms and implementation of the 2008 Operating Agreement are simply not a part of this litigation and detract from the actual focus of the litigation. *See* EPCWID Mem. at 20, 22-23, 25-26. The Court should deny EPCWID's motion to intervene to ensure this original action remains a dispute among sovereign states' regarding their respective interests under an interstate compact.

2. EPCWID Is a "Citizen" of Texas and the Doctrine of *Parens Patriae* Precludes EPCWID's Participation as a Party

a. EPCWID Is a Subdivision of the State of Texas and Derives Its Authority from State Law

As EPCWID acknowledges, EPCWID is a political subdivision of the state of Texas. EPCWID Mem. at 1. Specifically, EPCWID is a district formed under the statutes that the Texas Legislature enacted to fulfill the mandate of the State's Constitution. In 1917, Texas adopted Article XVI, Section 59, of the Texas Constitution, known as the "Conservation Amendment." *Texas Water Rights Com. v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971). This constitutional provision provides that the "conservation and development of all the natural resources of this State," including "the waters of its

rivers and streams," are "public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." Tex. Const. art. XVI, § 59(a). The amendment authorized the Legislature to create "such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution," and such districts shall have the "authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law." Tex. Const. art. XVI, § 59(b).

Water improvement districts, like EPCWID, are just one category of districts authorized by the Legislature pursuant to this constitutional authority. *See* Tex. Water Code § 55.021 ("A water improvement district may be created in a manner prescribed by this subchapter . . . under and subject to the limitations of . . . Article XVI, Section 59, of the Texas Constitution."); *see also* Tex. Water Code, ch. 54 (creation and governance of municipal utility districts); Tex. Water Code, ch. 58 (creation and governance of irrigation districts). Texas case law has summarized this relationship between the constitutional provision and enabling statutes:

> It is undoubtedly true that the people of Texas through the adoption of Article 16, Section 59, of the Constitution, intended to grant the State broad powers to take steps to conserve our natural resources such as water

> through utilization of such resources. Too, the legislature of Texas, pursuant to the authority there conferred, has passed, ...[various statutes], which authorize the creation of political subdivisions of the State to further the conservation and development of our natural resources. The agencies thus created are political subdivisions of the State . . . However, such agencies have only such powers as are granted by statute . . . .

Harris County Water Control & Improv. Dist. v. Houston, 357 S.W.2d 789, 795 (Tex. Civ. App. 1962) (*Harris County WCID*).

EPCWID is a creature of state statute. The State of Texas authorized its creation, and provides the authority that EPCWID exercises in its jurisdictional boundaries. EPCWID is no different than any other water improvement district, municipal utility district, irrigation district, or any district authorized by the Legislature pursuant to Article XVI, Section 59 of the Texas Constitution. *See Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300 (Tex. Civ. App. 2006) (analyzing the formation of a municipal utility district). "The Texas Legislature has provided for the creation of a number of kinds of conservation and reclamation districts." *Id.* at 308.

The State of Texas also places limits on the authority of EPCWID and other similar districts, and supervises their operations. For example, water improvement districts may only operate and provide irrigation services within their prescribed boundaries. Tex. Water Code § 55.161(a); § 55.163; *see also Harris County WCID*, 357 S.W.2d at 795 (explaining that the statutes "do not authorize the District to roam at large throughout the State and distribute water wherever it wishes without regard to limitations placed on it by statute"). The State maintains this control over districts like EPCWID through a "continuing right of supervision." The Texas Water Code specifically provides that the "power and duties of all districts and authorities created under . . . Article XVI, Section 59 of the Texas Constitution are subject to the continuing right of supervision of the State of Texas . . . ." Tex. Water Code § 12.081(a). This "right of supervision" falls within the jurisdiction of the Texas Commission on Environmental Quality. *See* Tex. Water Code § 5.013(a)(2); 30 Tex. Admin. Code § 293.3.

b. EPCWID Is Like Any Other Water User in Texas

Beyond providing its governmental authority as a political subdivision, the State of Texas also provides EPCWID with the right to use water. EPCWID has no independent right to divert water supplied by the Rio Grande Project apart from its

water right granted under state law.[2] "The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake . . . in the state is the property of the state." Tex. Water Code § 11.021(a). The "right to the use of state water may be acquired by appropriation in the manner and for the purposes provided" in the Water Code. Tex. Water Code § 11.022. The State may also extinguish the right to use its water if the appropriator does not comply with the provisions of the Water Code. Tex. Water Code § 11.030 (forfeiture for non-use); § 11.303 (recordation and filing requirements for certain water right claims); § 11.173 (cancellation of permits for non-use). EPCWID must acquire a water right under state law—like any other water user in the State—by filing a claim and obtaining a permit, certified filing or a certificate of adjudication. *See* Tex. Water Code §§ 11.121, 11.323.

Accordingly, EPCWID's right to divert Rio Grande water derives entirely from Texas state law, not its contract with the United States. Indeed, federal reclamation contracts do not grant a state law "water right" to the contractor. Since the enactment of the Reclamation Act in 1902, the premise of federal reclamation law has been reimbursement: charges levied on irrigated lands are used to repay the costs of constructing project

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[2] EPCWID's statement that its " 'water use rights . . . are not dependent upon the rights of state parties' " is incorrect. *See* EPCWID Mem. at 24.

works incurred by the federal government. *See* Act of June 17, 1902 (1902 Act), Pub. L. No. 57-161, § 4, 32 Stat. 388, 389. The Reclamation Project Act of 1939 formalized a contracting scheme for "the purpose of providing . . . a feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payment of construction charges . . . ." Act of August 4, 1939, Pub. L. No. 76-260, § 1, 53 Stat. 1187. Repayment contracts thus were offered to irrigation districts, like EPCWID, and the contracting district would receive project water in exchange for assuming a general repayment obligation for the construction costs of the project. *See Grant County Black Sands Irrigation Dist. v. United States*, 579 F.3d 1345, 1351 (Fed. Cir. 2009) (describing development of contracting authority under reclamation law).[3]

The contracting irrigation district does not obtain a water right recognized under state law by virtue of entering into a federal reclamation contract. *See* 1902 Act, § 8, 32 Stat. 390 (codified at 43 U.S.C. § 383) ("Nothing in this Act shall be construed as affecting . . . or to in any way interfere with the laws of any State or Territory relating to the control,

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[3] Hudspeth County Conservation and Reclamation District No. 1 executed a "Warren Act" contract with the United States. The Warren Act allows the United States to sell surplus water that is "in excess of the requirements of the lands to be irrigated under any project" to non-project landowners. 43 U.S.C. § 523.

appropriation, use, or distribution of water . . ."). Rather, in order to operate federal reclamation projects, the United States must acquire water rights and comply with state law in the "control, appropriation, use, or distribution of water," unless state law is inconsistent with another congressional directive.[4] 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 684-85 (1978). With respect to the operation of the Rio Grande Project in Texas, the United States obtained a water right from the State of Texas to store Rio Grande water, distribute water to Project lands in the State, and divert water to meet treaty obligations to Mexico. *See* Appendix to EPCWID Mem. (reprinting the Texas Commission on Environmental Quality Certificate of Adjudication held by the United States and EPCWID, which authorizes the diversion and impoundment of water at the American Diversion Dam and Riverside Diversion Dam in Texas). EPCWID is no different than any other water user in Texas. It must acquire and then maintain its water right in accordance with Texas state law.

Moreover, even EPCWID's ability to enter into the contracts asserted as the basis for its intervention, is purely based upon a grant of authority from the State of Texas. *See, e.g.*, Tex. Water Code § 55.185 (granting authority to water

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[4] The Compact, of course, is the basis of Texas' sovereign rights to Rio Grande water above Ft. Quitman, which it allocates within Texas pursuant to Texas state law.

improvement districts to contract with the United States to construct, operate and maintain facilities to deliver water and assume debt for district land); § 55.186 (addressing repayment of debt owed by the district under its contract with the United States) § 55.188 (granting authority over property associated with a reclamation project including construction and operation and maintenance). EPCWID could not have acquired a water right absent authority under state law, and it could not have entered into reclamation contracts absent authority under state law. As the sovereign that has both granted and limited EPCWID's powers of government, the State of Texas can and will adequately represent EPCWID's interests in Texas's apportionment of Rio Grande water.

c. EPCWID's Interest Is Not Unique, and Like Other Water Users, Is Dependent Upon Texas' Apportionsment Under the Compact

EPCWID claims that its interest in this dispute is distinct because of its position as a contractor for Rio Grande Project water. This interstate compact dispute, however, does not deal with EPCWID's contract with the United States. This original action centers on the delivery of Texas' apportionment of Rio Grande water pursuant to the Compact. The Compact may use the Project as a method to accomplish delivery of Texas' apportionment, but it is *Texas'* apportionment that is

delivered through the Project and to Texas water users in the State, such as EPCWID.

Moreover, EPCWID's interest in Texas' apportionment of Rio Grande water is not unique. It is an interest shared with all other water users of the State of Texas, and one that the State of Texas seeks to protect in this litigation.[5] In fact, contrary to EPCWID's misleading suggestion, EPDWID is not the only entity within the State of Texas that relies on Rio Grande water or the Rio Grande Project. *See* EPCWID Mem. at 10-11. For example, Hudspeth County Conservation and Reclamation District No. 1 (Hudspeth) also has rights to the Rio Grande via a permit issued by the State of Texas, and has a contractual right to Rio Grande Project water under a Warren Act contract with the United States.[6] EPCWID and Hudspeth have distinct interests, which are adversely affected by actions taken by New Mexico in violation of the Compact, and which require protection by the State of Texas. Both

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[5] To the extent EPCWID seeks any damages by intervention in this litigation, the Supreme Court has never awarded a non-state party money damages in an interstate water compact case.

[6] Hudspeth is authorized to use up to 151,902 acre-feet per year of water from the Rio Grande Project pursuant to a December 1, 1924 Warren Act contract with the United States. In addition, Texas' Upper Rio Grande Adjudication identified the right of Hudspeth to divert up to 27,000 acre-feet from the Rio Grande for irrigation. *See* Brief of Hudspeth County Conservation and Reclamation District No. 1 as Amicus Curiae in Opposition to New Mexico's Motion to Dismiss at 7.

EPCWID and Hudspeth occupy a class of affected Texas users of water and EPCWID's self-declared significance with respect to the use of Texas' allocation of Rio Grande water does not set it apart from Hudspeth or any other user of water in the class.

Additionally, the City of El Paso (City) has interests in the State of Texas' apportionment of Rio Grande water. The City has both a contract for Rio Grande Project water with EPCWID and also maintains wells that may derive, at least in part, water implicated in this litigation.[7] Those interests are derivative of the Compact interests of the State of Texas and, in this context, are no different from the interests that EPCWID here tries to assert are "unique." In this original action, the State of Texas seeks to enforce its rights under the Rio Grande Compact, including the interests of entities such EPCWID, Hudspeth, the City, and all other affected Texas water users. The Court has found such intrastate interests insufficient to justify intervention, and it should do so here.

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[7] The City of El Paso currently has contracts with EPCWID that entitle it to approximately 70,000 acre-feet of water in years when a full allotment of Rio Grande Project water is available. *See* Brief of Amicus Curiae City of El Paso, Texas in Support of Plaintiff's Motion for Leave to File Bill of Complaint at 3. In years with a limited supply of surface water, the City of El Paso pumps up to 80,000 acre-feet of groundwater to meet its demands. *Id.*

d. EPCWID's Interest Is Adequately Represented by Texas

Pursuant to the doctrine of *parens patriae*, states must be deemed to represent their citizens in equitable apportionment actions. The reason for this is clear when one considers that "[t]he interests of a State's citizens in the use of water derive entirely from the State's sovereign interest in the waterway. If the State has no claim to the waters of an interstate river, then its citizens have none either." *South Carolina*, 558 U.S. at 279-80. In *South Carolina*, non-sovereign bi-state entities were permitted to intervene because the Court found that neither state could sufficiently represent these entities' interests. This was based on the fact that the states expressly stated as much. *South Carolina*, 558 U.S. at 270, 273. Here, Texas affirmatively states the opposite. Texas authorizes EPCWID's diversion of water and supervises its functions as a political subdivision and as a water user in the State. Texas, as sovereign, must therefore be deemed to represent the interests of its political subdivision in this litigation.

Although EPCWID claims that its rights and interests "are not identical" to those of Texas and that Texas' interests in the Compact "are not truly *parens patriae*," EPCWID fails to explain how its interest is separate or distinct from Texas' interest in its apportionment under the Compact. ECPWID's interest need not be "identical" to Texas' interest. This is not the standard. In order to be entitled to

intervene, EPCWID needs to demonstrate that Texas will not "adequately represent" ECPWID's interest. EPCWID cannot make this showing. Ultimately, EPCWID's right to water from the Rio Grande Project is derivative and dependent upon Texas' apportionment under the Compact. The entire purpose of Texas' suit against New Mexico is to secure its rights to the water apportioned to it under the Compact.

e. EPCWID's Reclamation Contract Is Not a Basis for Intervention

In *Nebraska v. Wyoming*, 515 U. S. 1 (1995), this Court addressed an issue similar to the circumstances presented here. In that case, Wyoming sought to amend its pleadings to include allegations challenging the United States' management of Reclamation reservoirs on the North Platte River. *Id.* at 15. After noting that these Reclamation reservoirs and the availability of water from them was a predicate to its prior apportionment decree, the Court addressed the United States' concerns that allowing Wyoming's amendment would create the specter of intervention by individuals with storage contracts for water from the Reclamation facilities. *Id.* at 19-22. The Court rejected these concerns noting that in original jurisdiction cases each State must be deemed to represent all of its citizens and is presumed to speak in their citizens' best interests. *Id.* at 21. The Court also reiterated the general rule that water disputes among States may be resolved without the participation of

individual claimants, like those with storage contracts for water from the Reclamation facilities on the North Platte River, who nonetheless would be bound by the result reached through representation by their respective States. *Id.* at 22.

3. EPCWID Has No Direct Bi-State Interests That Justify Its Intervention

a. *South Carolina*

In *South Carolina*, the Supreme Court, for the first time, granted intervention in an interstate water dispute to a non-sovereign entity. Although the Court reaffirmed the rule for intervention enunciated in *New Jersey*, it held that two of the three non-state parties were entitled to intervene under that high standard. *South Carolina*, 558 U.S. at 256. The Court allowed the Catawba River Water Supply Project (CRWSP) and Duke Energy Carolinas, LLC (Duke Energy) to intervene, but denied the City of Charlotte's request for intervention.

The Court described CRWSP as "an unusual municipal entity" because it was a joint venture of two counties, one located in North Carolina and one located in South Carolina. *South Carolina*, 558 U.S. at 261, 269. CRWSP was a "bi-state entity" with an advisory board made up of representatives from both counties, obtained its revenue from bi-state sales, and operated infrastructure and assets owned by both counties. *Id.* at 269. Additionally, CRWSP

relied upon authority granted by North and South Carolina to draw water from the Catawba River and its activities depended upon authority conferred by both states. *Id.* As the Court noted, "[i]t is difficult to conceive of a more purely bi-state entity." *Id.* The Court found that CRWSP had a "compelling interest in protecting the viability of its operations, which are premised on a fine balance between the joint venture's two participating counties." *Id.* at 270. This compelling interest distinguished CRWSP "from all other citizens of the party States." *Id.* at 270. Further, the Court was persuaded that neither state could properly represent CRWSP's interests, with North Carolina expressly stating as much. *Id.*

The Court also allowed Duke Energy to intervene. Duke Energy operated eleven dams and reservoirs (six in North Carolina, four in South Carolina, and one on the border between the two states) that controlled the flow of the Catawba River and provided hydroelectric power to the region. *South Carolina*, 558 U.S. at 261. Duke Energy sought leave to intervene based on its interests in the operation of these facilities, as well as its interest in protecting the terms of its existing license governing its power operations (FERC License) and the Comprehensive Relicensing Agreement (CRA), signed by 70 parties in North and South Carolina, which formed the basis of its pending renewal application. *Id.* at 261-62. The Court found that equitable apportionment of the Catawba River would need to take into account Duke Energy's water needs to power the region. *Id.* at 272. Through the

operation of its dams, Duke Energy controlled the flow of the river. As a result, the Court concluded there was "no other similarly situated entity on the Catawba River, setting Duke Energy's interests apart from the class of all other citizens of the States." *Id.* The Court held that these interests should be represented by a party to the action. Furthermore, the Court found that neither state could sufficiently represent these interests, noting that neither state had signed the CRA, and that North Carolina intended to seek its modification. *Id.* at 273.

The Court, however, denied the City of Charlotte's motion to intervene on the grounds that North Carolina, as the sovereign, would adequately protect the City's interests. In reaching this decision the Court noted that (1) Charlotte's transfers of water from the river "constitute part of North Carolina's equitable share," (2) Charlotte occupied "a class of affected North Carolina water users," and (3) Charlotte did not have interests on both sides (i.e., in both states) of the dispute. *South Carolina,* 558 U.S. at 274-75. Charlotte's interest therefore fell "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *Id.* at 274. As a result, its request for intervention was denied.

b. EPCWID Is Not a "Bi-State Entity"

Despite its assertions to the contrary, EPCWID is not a bi-state entity like those permitted

to intervene in *South Carolina*. As explained above, EPCWID is a political subdivision of the State of Texas. It derives no power or authority from the State of New Mexico and has no legal presence in New Mexico. Additionally, there are stark differences between EPCWID and CRWSP in *South Carolina*. First, to serve on EPCWID's Board of Directors, one must be a resident of the state of Texas and own land subject to taxation within EPCWID. Tex. Water Code § 55.102. Second, EPCWID obtains its revenue from assessments and taxes imposed on lands within its boundaries. Tex. Water Code § 55.351 et seq.; § 55.651 et seq. Finally, Texas state law alone provides EPCWID with its authority and power, as well as its right to divert and use water in Texas. *See* Appendix to EPCWID Mem. EPCWID is purely an entity of the State of Texas alone.

EPCWID's single-state interests are, in fact, the same as those of the City of Charlotte in *South Carolina*. EPCWID's water constitutes part of Texas' equitable share under the Compact. EPCWID's water users "are dependent on Rio Grande water apportioned to Texas, and allocated to EPCWID through the Rio Grande Project . . . ." *See* Brief of Amicus Curiae El Paso County Water Improvement District No. 1 in Support of State of Texas' Motion for Leave to File Complaint (EPCWID Amicus) at 5. By intervening in this action EPCWID wants to protect its allocation of Rio Grande Project water. However, this is an interest EPCWID shares with all of the other citizens of Texas, including each

of the water users within its boundaries, and one that the state of Texas is presumed to represent as *parens patriae*.

c. EPCWID Does Not Have Interests on Both Sides of the Dispute

EPCWID is also like the City of Charlotte because it does not have interests on both sides of this dispute (i.e., in New Mexico and in Texas). The mere fact that EPCWID is a "beneficiary of a project which crosses (indeed crisscrosses) state lines" is not enough to justify its intervention. Even if EPCWID owns and operates infrastructure in both states, this infrastructure is not at all like the intricate system of dams and reservoirs operated by Duke Energy in *South Carolina*, which effectively controlled the flow of the Catawba River. In contrast to Duke Energy, EPCWID does not own Elephant Butte Dam or Reservoir, nor does it control the releases that are made by the Rio Grande Project. EPCWID's sole purpose in intervening in this action is to protect its allocation of Rio Grande Project water that it provides to water users within its boundaries. EPCWID has an interest on only one side of this dispute and it is an interest shared with many other citizens of the state of Texas. This is insufficient to support EPCWID's request for intervention.

CONCLUSION

Based upon the foregoing, the State of Texas respectfully requests that EPCWID's Motion for Leave to Intervene be denied.

Respectfully submitted,

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